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In the Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY, PETITIONER

v.

GUILLERMO NUEVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an endorsement required by federal law on insurance policies issued to commercial motor carriers requires the insurer to pay, in the first instance, a judgment for damages inflicted on a member of the public through an authorized third party's negligent use of a vehicle owned by the carrier but not covered by its policy, where the injured party has obtained a judgment against the third-party user, but not against the motor carrier itself.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Secretary of Transportation has regulatory authority over the transportation of goods or passengers by commercial motor carriers in interstate or foreign commerce, subject to various exemptions set out in succeeding provisions. 49 U.S.C. 13501, 13502-13508 (Supp. V 1999) (exemptions).[1] Section 13901 provides that a person may

[1] The provisions of Subtitle IV of Title 49 were generally revised by the ICC Termination Act of 1995 (ICC Termination Act), Pub. L. No. 104-88, 109 Stat. 803. Relevant portions of Title 49 were revised, codified, and enacted into positive law by the Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Unless otherwise indicated, all citations in this brief to provisions of the United States Code are to the 1994 edition as modified by the 1999 Supplement (Supp. V).

provide transportation subject to the Secretary's jurisdiction only if registered to do so. Section 13902 sets out requirements for registration, including that the registrant be "willing and able to comply with * * * the minimum financial responsibility requirements established by the Secretary pursuant to section[] 13906[.]" 49 U.S.C. 13902(a)(1).

Section 13906 requires in pertinent part:

> The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 [relating to carriers transporting passengers] and 31139 [relating to carriers transporting property * * *. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except [cargo] * * *), or both.

49 U.S.C. 13906(a)(1). That requirement is restated in an applicable regulation, 49 C.F.R. 387.301 (set out at Pet. App. 43a-44a), which provides in part:

> No common or contract [motor] carrier * * * shall engage in interstate or foreign commerce * * * unless and until there shall have been filed with and accepted by the FMCSA [Federal Motor Carrier Safety Administration] * * * certificates of insurance * * * or other securities or agreements, in the amounts prescribed in § 387.303, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in

> transportation subject to Subtitle IV, part B, chapter 135 of title 49 of the U.S. Code, or for loss of or damage to property of others[.]

49 C.F.R. 387.301(a)(1), as amended by 66 Fed. Reg. 49,873 (effective Oct. 1, 2001).[2] Section 13906 specifies that the Secretary "may determine the type and amount of security filed" in satisfaction of its requirements, and that he "shall * * * prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the coverage required under this section." 49 U.S.C. 13906(d) and (f).

Section 31139 of Title 49, to which Section 13906 refers, generally requires the Secretary to "prescribe regulations to require minimum levels of financial responsibility" for all motor carriers transporting property for hire in interstate or foreign commerce. See 49 U.S.C. 31139(b). The financial responsibility requirements apply to any carrier using a vehicle with a gross weight of at least 10,000 pounds, even if

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[2] Section 387.301 was originally promulgated by the Interstate Commerce Commission, and was formerly set out at 49 C.F.R. 1043.1 (1995). When Congress abolished the ICC in 1995, it provided that "[a]ll * * * regulations * * * issued" by the ICC in performing functions transferred to the Secretary of Transportation "shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law." ICC Termination Act, Pub. L. No. 104-88, § 204(a), 109 Stat. 941, (49 U.S.C. 701 note 2); see also ICC Termination Act, § 205, 109 Stat. 943. The regulation was redesignated as 49 C.F.R. 387.301 in 1996. See 61 Fed. Reg. 54,706, 54,709. The Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748, created the Federal Motor Carrier Safety Administration (FMCSA) within the Department of Transportation, and charged it with carrying out "duties and powers related to motor carriers or motor carrier safety vested in the Secretary" by various provisions of Title 49, including chapters 133-149 and 311. See 49 U.S.C. 113(a) and (f)(1); 49 C.F.R. 1.73(a) and (f).

the carrier or its business otherwise comes within an exemption from the regulatory jurisdiction conferred on the Secretary by Section 13501, and therefore from Section 13901's registration requirement. 49 U.S.C. 31139(b) and (g).[3] The carrier must have insurance (including qualified self-insurance) or other adequate security "sufficient to satisfy liability amounts established by the Secretary," but not less than $750,000, "covering public liability, property damage, and environmental restoration."[4]

The Secretary's regulations establish a basic coverage requirement of at least $750,000. 49 C.F.R. 387.7(a), 387.9. They also prescribe a specific form of endorsement—Form MCS-90—that must be included in any insurance policy in order to satisfy the financial responsibility requirements of Section 31139. 49 C.F.R. 387.7(b)(3) and (d), 387.15 (Illus. I) (as amended by 66 Fed. Reg. at 49,873). The same form of endorsement is used to satisfy the registration requirement under Section 13906. See 49 C.F.R. 387.313(a)(4). The Form MCS-90 endorsement, the text of which is set out at Pet. App. 40a-43a, provides in part:

> [T]he insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability [*i.e.*, liability for injury to persons or property, see note 4, *supra*] resulting from negligence in the operation, main-

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[3] A carrier that is exempt from jurisdiction under Chapter 135 is subject to civil penalties if it fails to comply with applicable financial responsibility requirements, see 49 U.S.C. 31139(f), but it need not submit proof of financial responsibility, as is required for registration.

[4] "Public liability" is defined as "liability for bodily injury, property damage, and environmental restoration." Pet. App. 42a; see 49 C.F.R. 387.5; see also 49 U.S.C. 13906(a)(1) (requiring insurance sufficient to pay judgments for "bodily injury to, or death of, an individual * * * or for loss or damage to property").

> tenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 [now revised and reenacted as 49 U.S.C. 13906 and 31139] regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

49 C.F.R. 387.15 (Illus. I); Pet. App. 42a-43a.[5]

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[5] The Form as set out in the petition appendix does not reflect amendments effective October 1, 2001, which remove references to the ICC. See 66 Fed. Reg. at 49,873 (amending 49 C.F.R. 387.15, Illus. I).

2. a. Petitioner is an insurance company that provided liability insurance to a federally registered motor carrier, Baljit Sahota, who was doing business under the name Sahota Trucking. See Pet. App. 20a. The policy included, as required, an MCS-90 endorsement. *Id.* at 23a.

Sahota agreed to sell a truck trailer to Garmukh Garcha, doing business as Blue Star Trucking, and Inderjit Singh. Pet. App. 20a. Sahota evidently transferred possession of the trailer to the purchasers, but retained legal title pending full payment of the purchase price. See *id.* at 19a-20a. In late 1995, while driving a truck tractor owned by Blue Star and Singh and pulling the Sahota trailer, Garcha rear-ended a bus owned by respondent Los Angeles County Metropolitan Transportation Authority and driven by respondent Guillermo Nueva. *Id.* at 19a. The collision destroyed the bus and injured respondent Nueva. *Id.* at 3a, 20a.

Respondents sued various defendants, including Sahota, in state court. See Pet. App. 20a. Petitioner evidently paid to defend Sahota in that action, and funded a settlement equal to the statutory financial responsibility requirement for registered vehicle owners in California, which is $15,000 for personal injury and $5000 for property damage. See Resp. Br. in Opp. 4; Cal. Vehicle Code § 16056(a) (West 2000 & Supp. 2001). So far as appears, however, no judgment was ever entered against Sahota. Respondents obtained default judgments against some or all of the remaining defendants, including Garcha (Blue Star) and Singh. See Pet. App. 20a, 28a n.8. According to the courts below, Garcha and Singh are uninsured. *Id.* at 3a, 30a.

b. Petitioner brought the present federal action seeking a declaratory judgment with respect to its duty, under the policy it had issued to Sahota, to indemnify Sahota, Garcha (Blue Star), Singh, or others for liability arising out of the accident. See Pet. App. 3a, 17a-18a. The court granted summary judgment in favor of petitioner. *Id.* at 33a.

The district court first held (Pet. App. 28a-30a) that the Sahota trailer was not covered by the terms of the policy issued by petitioner, because at the time of the accident it was not listed on the schedule of vehicles covered by the policy. See *id.* at 28a. The court concluded that although the MCS-90 endorsement (and a similarly worded endorsement required by state law) would "require [petitioner] to pay any final judgment against its named insured, Sahota, subject to reimbursement by Sahota," it did not "render the trailer a 'covered vehicle,'" and therefore "no 'coverage' [was] available under the policy." *Id.* at 29a-30a. Next, the court considered (*id.* at 30a-33a) the significance of the fact that Garcha and Blue Star were using the trailer with Sahota's permission. The court held (*id.* at 31a) that under the Sahota policy, "permissive users of covered autos are additional insureds, but permissive users of noncovered autos are not." The MCS-90 endorsement and its state analogue do not alter that result, the court explained, because they "do not vary the terms of the policy so as to create 'coverage' where it did not formerly exist." *Id.* at 32a. The court concluded that while the endorsements do provide for "payment of a final judgment, subject to reimbursement," that obligation "is to [the] named in[s]ured alone." *Id.* at 32a, 33a.

3. The court of appeals reversed. Pet. App. 1a-15a. The court first explained that the insurance policy issued by petitioner to Sahota defines "who is an insured" as follows:

> (a) You [the named insured] for any covered auto; [and]
>
> (b) Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . [.]

Id. at 4a-5a (capitalization omitted). The court agreed with the district court that the trailer involved in the accident was not a "covered auto" under the Sahota policy at the time

of the accident, and that Garcha and Blue Star, as permissive users of a non-covered vehicle, are therefore "not 'insureds' per the * * * policy's express terms." *Id.* at 5a. Unlike the district court, however, the court of appeals held that the MCS-90 endorsement "does provide for indemnification under the factual circumstances of this case." *Id.* at 8a. Distinguishing cases involving the duty to defend (rather than to indemnify) or the allocation of responsibility among multiple insurers, see *id.* at 8a-11a, the court pointed out that respondents in this case "are injured members of the public, and thus are [members of] precisely the group meant to be protected by the MCS-90." *Id.* at 10a; see also *id.* at 11a, 14a.

In construing the endorsement, the court of appeals relied upon the analysis in *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996). See Pet. App. 11a-15a. *Adams* held that where an insured motor carrier lent a non-covered vehicle to an uninsured driver, the MCS-90 endorsement required the carrier's insurer to satisfy a judgment entered against the driver arising out of an accident involving the vehicle. See *id.* at 11a-12a. The court in this case agreed (*id.* at 13a):

> The critical language in the endorsement is the provision which states that "the insurer agrees to pay . . . any final judgment recovered against the insured for public liability . . . *regardless of whether or not each motor vehicle is specifically described in the policy*[.]" (emphasis added). This language indicates that whatever limitation a policy expresses regarding coverage extending only to "covered" or "specified" autos, this limitation ceases to operate when an injured member of the public seeks indemnification on behalf of the "insured."

The court of appeals reasoned that the endorsement would supersede the normal limitations of the policy and require petitioner to pay a judgment against Sahota—the

named insured—if he caused injury while driving a non-covered auto, and that the effect of the endorsement is therefore "to modify the policy's definition of an 'insured.'" Pet. App. 13a-14a. The court saw "no rational basis for distinguishing," in this regard, between the first part of the policy definition, relating to the named insured, and the second part, relating to permissive users. *Id.* at 14a. "In both cases," the court explained (*ibid.*), "the MCS-90 negates the limitation that only users of 'covered autos' are 'insureds.'" On the facts of this case, the court observed (*id.* at 14a-15a), "Garcha and Blue Star were using the * * * trailer with Sahota's permission at the time of the accident," and "the trailer was, at that time, a regulated vehicle that Sahota owned." Accordingly, the court concluded (*id.* at 15a), "Garcha and Blue Star are 'insureds' under the MCS-90 modification to the Sahota policy," and "[petitioner] is liable to [respondents] for any judgment against Garcha and Blue Star up to the policy maximum."

DISCUSSION

1. The court of appeals' decision is incorrect. It is true, as the court emphasized (see Pet. App. 10a-11a), that the financial responsibility provisions of Title 49 (as they apply to both registered and unregistered carriers) and the Secretary of Transportation's implementing regulations are intended to protect the public in the case of accidents involving vehicles owned or operated by commercial motor carriers. They guarantee, in effect, that there will be resources available (up to the statutory or regulatory responsibility limit) to pay a final judgment obtained by an injured member of the public against a carrier for injury caused by the negligent operation, maintenance or use of a carrier's vehicles—even if the policy itself does not provide coverage in a particular case, and even if the carrier is otherwise insolvent. They also protect the public against

delays in the enforcement of such a judgment that might otherwise result from disputes over coverage between the carrier and its insurer, or between different insurance companies. Contrary to the court of appeals' conclusion, however, existing federal regulations do not require a carrier's insurer to satisfy a judgment entered against any party other than the carrier itself.

a. As explained above (see p. 2, *supra*), Section 13906 of Title 49 conditions federal registration of a commercial (or "for-hire") motor carrier on the carrier's filing with the Secretary proof of insurance (or other security) sufficient to pay, up to a prescribed limit, "for each final judgment *against the registrant* for bodily injury" or property damage "resulting from the negligent operation, maintenance, or use of motor vehicles." 49 U.S.C. 13906(a)(1) (emphasis added). The limitation expressed in the italicized words is repeated in the applicable regulation, 49 C.F.R. 387.301 (see pp. 2-3 & note 3, *supra*), which requires the submission of insurance or other security "conditioned to pay any final judgment recovered *against such motor carrier*" (emphasis added). Essentially the same limiting language is carried over to the MCS-90 endorsement form that the Secretary prescribes for use in complying with both the registration requirements and the similar financial responsibility requirements that apply to all carriers (registered or unregistered). See 49 C.F.R. 387.15. Because, however, that form is designed to be attached to an insurance policy, it provides that the insurer will pay "any final judgment recovered *against the insured.*" In the context of the statutory and regulatory provisions that the MCS-90 form is designed to implement, that language can only sensibly be read to refer to the *named* insured to whom the underlying policy is issued—that is, the motor carrier that must obtain the policy, so endorsed, in order to comply with federal statutory requirements.

If there were any doubt about that construction of the MCS-90 form, it would be resolved by the definitions set out in the Secretary's regulations and by the other uses of the term "insured" within the Form MCS-90 itself. The applicable definitional provision specifies that for purposes of the regulations set out in Sections 387.1-387.17, the term "insured" means "the motor carrier *named* in the policy of insurance" or other security. 49 C.F.R. 387.5, "Insured and principal" (emphasis added). Moreover, the term "the insured" appears in ten other places within the body of the MCS-90 Form. See Pet. App. 40a-43a (reprinting form). One of those occurrences is simply parallel to the use already quoted. *Id.* at 43a ("upon failure of the company to pay any final judgment recovered against the insured"). All the rest, however, are most naturally read to refer only to the named insured, see, *e.g.*, *id.* at 42a ("does not apply to injury to or death of the insured's employees"), and at least three cannot fairly bear any other construction. See *id.* at 41a ("Cancellation of this endorsement may be effected by the company or the insured."); *id.* at 42a (endorsement amends underlying policy "to assure compliance by the insured" with federal financial responsibility requirements); *id.* at 43a (all terms of policy remain "binding between the insured and the company").

Apart from the clarity of the pertinent statutory, regulatory and contractual provisions, limiting the obligation assumed by an insurer under the federal financial responsibility rules to judgments entered against the named insured makes sense for at least two reasons. First, although the federal scheme requires the modification and expansion of typical private insurance contracts, it uses such contracts as its starting point and basic tool (rather than, for example, requiring motor carriers to contribute to a publicly administered fund for the compensation of persons injured by uninsured commercial vehicles). The MCS-90 endorse-

ment requires an insurer to accept liability beyond that which it might accept in a purely private transaction, but it also requires a corresponding agreement by the insured motor carrier to reimburse the insurer for any loss that would not be covered by the underlying policy. See Pet. App. 43a (Form MCS-90). The incremental risk imposed on the insurer is therefore principally the risk that the carrier will not be able to satisfy such a reimbursement obligation. The risk of non-reimbursement is one that an insurer can evaluate fairly easily with respect to prospective named insureds, but not with respect to third parties. Because the statutory and regulatory provisions operate by setting minimum standards for otherwise private insurance arrangements (including, in a few cases, self-insurance), it is far more natural to interpret those provisions to require motor carriers and insurers to include in their private arrangements payment and reimbursement obligations that benefit the public, but run only to each other.

Second, the federal financial responsibility provisions focus on requiring motor carriers to carry adequate insurance to protect the public from risks created by the carriers' own operations. It is central to that purpose to assure that an injured member of the public will be able to recover on a judgment against the carrier, even if the particular vehicle involved in an accident was for some reason not "specifically described in the policy," or was driven on a route the carrier was not authorized to serve, and "irrespective of the financial condition, insolvency or bankruptcy of the insured." See Pet. App. 42a, 43a (terms of Form MCS-90). It is not, however, central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier. If the registered motor carrier is legally responsible—directly, indirectly, or

vicariously—for injuries caused by the operation of one of its vehicles, then it should be possible for the injured party to obtain a judgment against the carrier. The federal financial responsibility provisions were designed to ensure the collectability of any such judgment—not to relieve the injured party from the obligation to obtain a final determination of legal liability (see *id.* at 42a, requiring insurer to pay any "final judgment" for public liability), or to vary the legal rules under which such a determination is to be made.

b. In deciding this case in favor of respondents, the court of appeals ignored the statutory and regulatory provisions described above. The court focused instead on the endorsement's provision that the insurer must pay a judgment "regardless of whether or not each motor vehicle [subject to the financial responsibility provisions] is specifically described in the [underlying] policy." Pet. App. 13a (emphasis omitted). Construing that language in light of the general purpose of the financial responsibility provisions to protect injured members of the public (*id.* at 10a-11a), the court concluded (*id.* at 14a) that "the effect of the MCS-90 endorsement is to modify the policy's definition of an 'insured,'" both with respect to the named insured and with respect to permissive users, by "negat[ing] the limitation [in the policy language] that only users of 'covered autos' are 'insureds.'" That conclusion rests, however, on a fundamental misunderstanding of the endorsement.

Form MCS-90 is not intended, and does not purport, to vary any term of the underlying coverage. To the contrary, the form specifically *preserves* those terms as between the insurer and the named insured. See Pet. App. 43a. The endorsement does require the insurer to pay certain judgments entered against the motor carrier, whether or not the events giving rise to the judgment come within the policy's coverage, and subject to reimbursement by the carrier if they do not. It does not, however, "modify the policy's

definition of an 'insured'" (*id.* at 14a), either with respect to the named insured *or* with respect to permissive users.

If an injured party obtains a judgment against the insured motor carrier (for public liability resulting from negligence with respect to vehicles subject to the financial responsibility requirements), the endorsement requires the insurer to pay the judgment, without regard to coverage under the policy. Conversely, if the injured party obtains a judgment against a defendant other than the insured motor carrier, the insurer may or may not be required to pay that judgment *under the policy*—for instance, if the defendant was driving a "covered auto" with the permission of the named insured, see Pet. App. 4a-5a, 14a—but it will have no obligation to make payment under the endorsement. Thus, the policy and the endorsement, while linked, impose different obligations based on different key determinants: An obligation to indemnify (*i.e.*, pay without reimbursement) based on the policy's coverage of a particular risk, on the one hand, and on the other an obligation to make payment in the first instance, subject to possible reimbursement, based on a final judgment entered *against the motor carrier itself*. The court of appeals erred in confusing those two obligations.

2. The Ninth Circuit in this case relied on and endorsed a similar decision reached by the Tenth Circuit in *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (1996). See Pet. App. 11a-14a. *Adams*, like the decision below, erred in construing Form MCS-90 to require an insurer to satisfy a judgment entered against a permissive user of a vehicle not covered by the underlying policy, on the theory that the endorsement "modifie[d] [the term] 'insured' as defined in the basic polic[y]." See *Adams*, 99 F.3d at 970; see also *Pierre* v. *Providence Washington Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001).

Petitioner contends (Pet. 20-25) that the decisions in this case and in *Adams* conflict with decisions of the Third, Fifth,

Eighth, and District of Columbia Circuits. Although we agree that it is difficult to reconcile some of the reasoning in those cases with that of the decision below, the cases petitioner cites are distinguishable from this one in various respects.

In *National Mutual Insurance Co.* v. *Liberty Mutual Insurance Co.*, 196 F.2d 597, cert. denied, 344 U.S. 819 (1952), the D.C. Circuit held that the insurer of a truck owner-driver who had been found liable for an accident could not recover the cost of that judgment from the insurer of the motor carrier that had hired the truck and driver. The court refused to base such liability, which was excluded by the terms of the carrier's policy, on the endorsement then required by the Interstate Commerce Commission—a precursor to the present Form MCS-90, which also provided for the (potentially reimbursable) payment of "any final judgment recovered against the insured" for injuries resulting from negligence in the operation of regulated vehicles. *Id.* at 599. It reasoned that although the endorsement "doubtless would have enured to the benefit of [the injured party], had she chosen to sue [the motor carrier]," it did not "make [the owner-driver] an 'insured' under the [carrier's] policy." *Id.* at 600.

Although that reasoning reflects a proper understanding of the language now incorporated in Form MCS-90, and is inconsistent with the Ninth Circuit's misinterpretation of that form in this case, it did not receive extended consideration from the D.C. Circuit in *National Mutual.* The holding in that case is, moreover, plausibly distinguishable from the holding below, because *National Mutual* involved a dispute over liability between two insurers, rather than a suit by an injured member of the public seeking initial satisfaction of a final judgment arising out of a trucking accident. That contextual point is one that the court below clearly considered significant to its decision, and that the

D.C. Circuit might also consider significant in a future case. Compare Pet. App. 11a (distinguishing cases on ground that "the integral purpose of the MCS-90, to protect third party members of the public, is not implicated in a dispute between two insurers"), with *National Mutual*, 196 F.2d at 598 ("This is a controversy between two insurance companies over which of them shall bear the burden of a loss."). In addition, although the ICC endorsement at issue in *National Mutual* included the "judgment recovered against the insured" language that we think is central to proper resolution of this case, it did not include the specific language—"regardless of whether or not each motor vehicle is specifically described in the policy"—that the Ninth Circuit considered to be the "critical" feature of Form MCS-90. Compare 196 F.2d at 599 with Pet. App. 6a, 13a; see also *Adams*, 99 F.3d at 966, 968, 970. Accordingly, it is unclear whether the D.C. Circuit, if faced with a case identical to this one, would consider the result compelled by the holding or reasoning of *National Mutual*. The same is true, for essentially the same reasons, of the Third Circuit and its decision in *Carolina Casualty Insurance Co.* v. *Insurance Company of North America*, 595 F.2d 128, 135-139 & n.25 (1979).

The other two decisions that petitioner cites (Pet. 21-24) did not, as petitioner acknowledges (see Pet. 23), construe the language of the MCS-90 or its predecessor ICC endorsement. In *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F.2d 131, 136-137 (1974), the Eighth Circuit held that a motor carrier's insurance policy did not by its terms provide for the payment of a judgment recovered against an owner-driver hired by the carrier, where at the time of the accident the driver was not using his vehicle "exclusively in the business of the named insured." The court refused to vary that result on the basis of statutory and regulatory provisions different from those at issue in this case, which provided in general that a carrier that leased a vehicle must

accept legal responsibility for its operation. *Id.* at 138-139; see 49 U.S.C. 304(e)(2) (1970); 49 C.F.R. 1057.4 (1970); cf. 49 U.S.C. 14102(a)(4) (successor provision). In discussing that point, the court referred to the ICC's regulation requiring motor carriers to carry insurance that would pay final judgments recovered "against * * * [the] carrier." 496 F.2d at 138-139 & n.8; see 49 C.F.R. 387.301 (successor regulation). The court reasoned that because the regulation dealing specifically with insurance—essentially the same one that is now implemented using the Form MCS-90—did not require a carrier to carry a policy that would cover judgments rendered against a party other than the carrier, it would "seem[] an unjustified and illogical leap" to hold that the separate legal responsibility provisions allowed recovery directly against the carrier's insurer, when the injured party had not taken the intermediate step of obtaining a judgment against the carrier itself. See 496 F.2d at 138-139.

Similarly, in *White* v. *Excalibur Insurance Co.*, 599 F.2d 50, 55, cert. denied, 444 U.S. 965 (1979), the Fifth Circuit held in part that the legal responsibility provisions relating to leased vehicles could not be invoked to force a carrier's insurer to pay a judgment rendered against a truck driver for negligently causing an accident that killed his fellow driver. In so holding, the court relied on *Wellman* for the proposition that under 49 U.S.C. 315 (succeeded by present Section 13906), "in order for [the insurer] to be liable under the policy filed by [the carrier] with the ICC, [the carrier] must first be adjudicated liable as a party." 599 F.2d at 55.

Like the D.C. Circuit's reasoning in *National Mutual*, the quoted statements from *Wellman* and *White* reflect a proper understanding of statutory and regulatory provisions now implemented in part through Form MCS-90, and to that extent those decisions may be said to conflict with *Adams* and the decision below. Neither decision focused, however, on the financial responsibility provisions, and neither dealt

with the text of a policy endorsement or with the present versions of the relevant statutes and regulations. Thus, as with D.C. and Third Circuits and their decisions in *National Mutual* and *Carolina Casualty*, it is not clear that either the Fifth or the Eighth Circuit would conclude that its precedents foreclose the result reached by the Ninth Circuit on the facts of this case.

3. Although the decision below is incorrect, the importance of the error is unclear. In order for the court's misinterpretation of Form MCS-90 to make a real difference, a registered motor carrier that itself carries proper insurance must first allow use of one of its vehicles (including a vehicle for which it is legally responsible, see, *e.g.*, 49 U.S.C. 14102(a)(4); 49 C.F.R. 376.12(c)(1)) by another party, who causes harm to a member of the public through negligent operation, maintenance, or use of the vehicle. The vehicle in question must be subject to the federal financial responsibility requirements, but for some reason not covered by the ordinary terms of the carrier's policy—a circumstance that the carrier will normally have strong financial (and legal) incentives to avoid. The injured party must then choose (or be able) to obtain a judgment only against the permissive user, not against the carrier (or must obtain a separate and larger judgment running only against the user). Moreover, in order for that result to be unjust, the carrier must have a valid defense that it asserted or could have asserted to avoid legal liability (direct, indirect, or vicarious) for the harm.

These circumstances are not wholly unlikely to occur; and, as petitioner points out (Pet. 27-28), the number of policy endorsements and accidents that could conceivably present the issue is at least theoretically quite large. The issue does not, however, appear to have been litigated with any great frequency in the past, including in the nearly five years between the decisions in *Adams* and in this case.

Moreover, and perhaps most important, the error in both *Adams* and this case is an error in the interpretation of a form promulgated by regulation. It could therefore be fixed through a regulatory proceeding before the Department of Transportation's Federal Motor Carrier Safety Administration, which is the expert agency charged by Congress with administering the provisions of federal law dealing with motor carrier safety. "Any interested person," including petitioner or its amici, could ask the Administrator of the FMCSA to consider the situation and clarify the existing regulations, including Form MCS-90 itself. See 49 C.F.R. 389.31; cf., *e.g.*, *Minimum Levels of Financial Responsibility for Motor Carriers: Environmental Restoration*, 51 Fed. Reg. 33,854 (1986) (interim rule amending definition of "environmental restoration" in 49 C.F.R. 387.5 and 387.15 (Illus. I) (Form MCS-90), adopted "[i]n response to a joint petition filed by the American Insurance Association (AIA) and the American Trucking Associations (ATA)"). The Department of Transportation informs us, however, that it has received no request for regulatory action or, apart from this Court's order in the present case, for further administrative guidance with respect to the proper interpretation of Form MCS-90.

Under these circumstances, we are not persuaded that the court of appeals' erroneous decision in the present case merits plenary review by this Court. We do note, however, that in deciding the case, the court below did not have the benefit of any official expression of the views of the Department of Transportation in construing the endorsement in the Form MCS-90 issued by the Department. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997). Because those views are now a matter of record, this Court might wish to consider granting the petition, vacating the judgment below, and remanding the case for further consideration in light of the positions expressed in this brief. See *Raquel* v.

Education Mgt. Corp., 531 U.S. 952 (2000); *Statewide Reapportionment Advisory Comm.* v. *Theodore*, 508 U.S. 968 (1993); *Oberly* v. *Baltimore & Ohio R.R.*, 479 U.S. 980 (1986); see also *Slekis* v. *Thomas*, 525 U.S. 1098 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in light of the views expressed herein.

Respectfully submitted.

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